No. 12284

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

CECELIA J. WILSON,

Appellant,

vs.

BUSINESS MEN'S ASSURANCE COMPANY OF AMERICA, a corporation,

Appellee.

Brief of Appellee

On appeal from the United States District for the District of Idaho, Eastern Division

HONORABLE CHASE A. CLARK, *Judge*

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STATEMENT OF THE CASE

The appellee respectfully suggests that a statement of facts additional to those recited by the appellant will be helpful in a consideration of this case.

On August 24, 1937, the appellee issued at its office in Kansas City, Missouri, an accident policy, by the terms of which it agreed to insure Harry H. Wilson against loss resulting directly and independently of all other causes from bodily injuries sustained during the term of the policy and effected solely through accidental means, subject however to the provisions, conditions, and limitations contained therein.

(Note): All numerals and numbers contained herein refer to the page of the printed transcript of the record, prepared under the direction of the Clerk of the United States Circuit Court.

It is not in any sense a life insurance policy, but purely an accident policy, and the premiums, as will be observed from the policy itself, are decidedly less than for life insurance.

This policy further provides that it should become effective at 12:00 o'clock noon (Standard Time at the residence of the insured) on the date of its issuance. It was signed in Kansas City, Missouri, and thereupon became effective at that place and time.

Harry H. Wilson, aged sixty-one, died at Pocatello, Idaho, on April 8, 1947, following an operation for recurrent inguinal hernia. About four years prior he sustained an operation for hernia at Mayo's Clinic (T. 34). He had also been previously operated on for a bowel obstruction (T. 86). Following the operation sedatives were given in the usual and ordinary way. Dr. Call, the attending physician, knew of the previous operations and that Mr. Wilson was accustomed to snoring and coughing (T. 34). The insured snored and coughed, and this was thought by his doctor to have resulted in embolism, causing his death. It is undisputed that the hernia, and the operation therefor, was a contributing cause of death (T. 78, 83, 86, 157, 164, 172, 182).

The appellant filed suit for the recovery of the amount stated in the policy, alleging among other things, the execution and delivery of the policy, the death of the insured, and that death was "caused by accidental means" (T. 2-3). The appellee answered and among other things admitted the execution and delivery of the policy, but denied that death was "through accidental means within the coverage" thereof, and

alleged that the policy was written and signed in Kansas City, Missouri, became effective at said place, and must be construed under the laws of the State of Missouri. In its answer the appellee further alleged the provisions of said policy with respect to coverage and limitations and that the deceased was operated on for hernia and that such was a bodily infirmity and wholly or partly caused or contributed to the death in such manner as to be within the exclusions of the policy (T. 7-10). The evidence supporting appellee's position is without substantial conflict as will be hereinafter pointed out. The Court made certain Findings of Fact and Conclusions of Law, and concluded that such hernia and the medical or surgical treatment therefor must be construed as sickness under the terms of the policy and that the appellant was not entitled to recover, and judgment in favor of the appellee was entered accordingly.

This case was tried at the same time as the case of Wilson vs. New York Life Insurance Company, heretofore appealed, with some additional evidence adduced by the appellant and appellee, and the trial court in rendering its opinion in the case under consideration referred to the New York Life case and adopted its opinion therein except for certain differences between the two policies, and appellee's contention that this policy must be construed pursuant to the law of Missouri (T. 12, 13). Because of the differences in the policies the trial court held in favor of the appellee. In this opinion the Court requested counsel for the defendant to prepare Findings, Conclusions, and Judgment (T.13). These were prepared but not followed by the Court, who thereupon ordered

counsel for plaintiff to prepare the same, and upon hearing directed plaintiff's counsel to amend "his proposed findings of Fact and Conclusions of Law" (T. 14). As the result of said hearing the Court ordered that the recrods show that the same were prepared under direction of the Court and neither counsel was responsible for the preparation of the same (T. 20).

After this appeal had been taken application was made by the appellant to dispense with the printing of certain exhibits, which application was granted, and said exhibits, some of which are hereafter referred to, are before the Court in the original form.

The appellee takes the position that the judgment of the trial court is correct and should be affirmed. It further takes the position, however, pursuant to authorities hereinafter cited, that certain other Findings and Conclusions should have been in favor of appellee and that these may be presented without the necessity of a cross-appeal or cross-assignments.

SUMMARY

The evidence adduced in the court below proved without substantial dispute that the death of Harry H. Wilson was caused wholly or partly or contributed to by a hernia or medical or surgical treatment therefor. This must be construed as sickness under the limitations of the insurance policy and death resulting therefrom excluded. The policy is unambiguous nad the finding of the trial court and the judgment entered thereon must be sustained.

A policy of insurance when unambiguous must be enforced

in accordance with its terms, and its contract cannot be impaired by loose and ill-considered interpretations.

The appellee without a cross-appeal may urge errors of the trial court which, if corrected, would further support the judgment. This judgment can be supported also upon the theory that the death was not an accident nor within the primary coverage of the policy, and furthermore that the policy was a Missouri contract and should be construed in accordance with the law of Missouri, which, under the facts herein, would, upon any theory, require judgment for the defendant.

POINTS AND AUTHORITIES

I.

Language used in an insurance policy should be given its ordinary and usual meaning, and when unambiguous must be enforced like any other contract.

Tennant Finance Corp v. Maryland Cas Co., 7 Cir. 86 F. 2d 789.

Travelers Insurance Co. v. Springfield Fire & Marine Insurance Co., 8 Cir., 89 F. 2d 757.

Carpenter v. Continental Cas. Co., 8 Cir., 95 F. 2d 634.

Sulzbacher v. Travelers Insurance Co., 8 Cir. 137 F. 2d 386.

Rintoul v. Sun Life Assur. Co. of Canada, 7 Cir. 142 F. 2d 776. Cert. denied 65 S. Ct. 188, 323 U. S. 776, 89 L Ed. 620.

Binder v. General American Life Ins. Co., (S.D.) 282 N.W. 521.

Maryland Casualty Co. v. Boise Street Car Co. (Ida.) 11 P. 2d 1090.

II.

An insurance policy must be read and construed as a whole.

New York Life Insurance Co. v. Hiatt, 9 Cir. 140 F. 2d 752.

Travelers Insurance Co. v. Ship by Truck Co, 8 Cir. 95 F. 2d 149.

Globe Indemnity Co. v. Wolcott and Lincoln, 8 Cir. 152 F. 2d 545.

Sulzbacoher v. Travelers Ins. Co., 8 Cir., 137 F. 2d 386.

Connellan v. Federal Life & Casualty Co., (Me.) 182 A. 13.

III.

While an insurance policy which is ambiguous in its terms will be construed most favorably to the insured, yet if there is no ambiguity the courts must enforce the contract in accordance with its terms and cannot make a new contract for the parties.

Davis v. Fidelity Mutual Life Insurance Co., 4 Cir. 107 F. 2d 150.

Protective Life Insurance Co. v. Hale, (Ala.) 161 S. 248.

Hewit Pharmacies Inc. v. Aetna Life Insurance Co., 266 N.Y.S. 290.

Kansas City Life Insurance Co. v. Freeman, 5 Cir. 120 F. 2d 106.

Hagarty v. William Akers, Jr. Co., (Pa.) 20 A. 2d 317.

Jorgensen v. Metropolitan Life Insurance Co., (N.J.) 44 A. 2d 907. Affirmed 55 A 2d 2.

Pioneer Life Insurance Co. v. Alliance Life Insurance Co. (Ill.) 30 N.E. 2d 66.

Clark Motor Co. v. United Pac. Insurance Co., (Ore.) 139 P. 2d 570.

IV.

An insurance contract should not be impaired by loose and ill-considered interpretation nor given unusual meanings from the language used or refined for the purpose of attempting to create an ambiguity.

29 Am. Jur., sec. 166, p. 185.

Terry v. New York Life Insurance Co., 104 F. 2d 498, 504.

Commercial Standard Insurance Co. v. Bacon, 10 Cor. 154 F. 2d 360, 364.

Williams v. Union Central Life Ins. Co. 291 U.S. 170, 78 L. Ed. 711, 718.

Travelers Insurance Co. v. Springfield Fire & Marine Insurance Co., 8 Cir. 89 F. 2d 757.

In Re Podolsky, 3 Cir., 115 F. 2d 965.

Sulzbacher v. Travelers Insurance Co., 8 Cir. 137 F. 2d 386.

Coons v. Home Life Insurance Co. of New York, (Ill.) 13 N.E. 2d 482.

Grimes v. Maryland Casualty Co., (Ill.) 20 N.E. 2d 982.

Rein v. New York Life Insurance Co., (Minn.) 299 N.W. 385.

V.

The trial Court found no ambiguity in the policy and the provisions thereof must be enforced.

VI.

The death certificate is prima facie evidence of the facts therein stated.

Sec. 39-207, Idaho Code.

Sec. 39-227, Idaho Code

Hillman v. Utah Power & Light Co., 56 Ida. 67, 51 P. 2d 703.

VII.

Without a cross-appeal an appelle may urge in support of the judgment any matter appearing in the record, even though the trial court concluded otherwise, when such argument is in further support of the judgment as entered.

U. S. v. American Railway Express Co., 265 U. S. 425, 68 L. Ed. 1087, 1093.

Morley Construction Co. v. Maryland Casualty Co., 300 U. S. 185, 81 L. Ed. 593, 597.

VIII.

While there is no liability in this case under the limitations of the policy neither is there liabltiy under its general provisions because death was not by accident.

Wade v. Pacific Coast Elevator Co., 64 Ida. 176, 129 P. 2d 894.

Hutchison v. Aetna Life Ins. Co., (Ore.) 189 P. 2d 586.

Rodia v. Metropolitan Life Ins. Co., (Pa.) 47 Atl. 2d 152.

Howe v. National Life Ins. Co., (Mass.) 72 N. E. 2d 425.

Ryan v. Continental Casualty Co., 47 F. 2d 472.

Hodges et al. v. Mut. Benefit Health & Acci. Assn., (Wash.) 131 P. 2d 937.

Order of United Commercial Travelers v. Nicholson 9 F. 2d 7.

Kellner v. Travelers Insurance Co., (Cal.) 181 P. 61.

Russell v. Glens Falls Indemnity Co., (Neb.) 279 N. W. 287.

IX.

A contract is deemed executed at the place where the last act was done, which in the case at bar was in Kansas City, Mis-

souri, and its construction should be governed by the laws of the State of Missouri.

11 Am Jur., Sec. 107, p 390 and p. 448.

Meiers & Frank Co. v. Bruce, 30 Ida. 732. 168 P. 5.

C. I. T. Corp v. Sanderson, 43 F. 2d 985.

W. H. Barber Co. v. Hughes (Ind.) 63 N. E. 2d 417.

Squire v. Eubanks (Mich.) 294 N. W. 166.

Prudential Insurance Co. of America v. Carlson., 10 Cir. 126 F. 2d 607.

X.

Under no theory could the appellant recover under this policy as construed by the laws of Missouri.

Caldwell v. Travelers Insurance Co., (Mo.) 267 S. W. 907.

Pope v. Business Men's Assurance Co., (Mo.) 131 S. W. 2d 887.

XI.

The Federal Courts will take judicial notice of the laws of another state.

Prudential Ins. Co. v. Carlson, 10 Cir. 126 F. 2d 607.

Zell v. American Seeting Co., 2 Cir. 138 F. 2d 641.

Judith Basin Land Co. v. Fergus County, 9 Cir. 50 F. 2d 792.

ARGUMENT

I.

THE EVIDENCE FULLY SUPPORTS THE CONCLUSIONS AND JUDGMENT OF THE TRIAL COURT.

As heretofore suggested this policy is an accident policy. Its language is clear and explicit and the coverage and exclusions are definitely and clearly recited. It insures against loss resulting directly and independently of all other causes from bodily injury effected solely through accidental means, subject to certain conditions and limitations contained in the policy. The policy definitely excludes and excepts bodily injury, fatal or otherwise, "caused wholly or partly, or the results of which are contributed to, by bodily or mental infirmity, hernia * * * or by any disease, or medical or surgical treatment therefor, such hernia * * * or medical or surgical treatment to be construed as sickness" (Defendant's Exhibit No. 11). The policy does not cover sickness. The trial court found that the deceased was operated on for hernia and that certain opiates and sedatives were administered as medical treatment, prior to death, following the operation for hernia. The exclusion provisions of the policy are then referred to in said findings, and the conclusion reached that because of such exclusions there could be no recovery (T. 17-19). Judgment was entered for the defendant (T.20-21). The evidence is overwhelmingly in favor of these conclusions. The operating physician, Dr. O. F. Call, following the death of Mr. Wilson, prepared and caused to be filed with the Department of Vital Statistics of the State of Idaho, the certificate of death (Defendant's Exhibit No. 10, T. 79-82).

This certificate was required to be filed by the attending physician pursuant to Sec. 39-207 Idaho Code, which section outlines the various questions to be asked and answered. Section 39-227, Idaho Code, provides that such certificate certified to be a true copy shall be prima facie evidence in all courts and places of the facts therein stated. In the case of Hillman v. Utah Power & Light Co., 56 Ida. 67, 51 Pac. 2d 703, the two statutes above referred to are considered. On page 80 of the Idaho Report the Court says:

> "A certified copy of the death certificate and a like copy of the physician's report of the accident were introduced in evidence with out objection, and it is now contended that under the foregoing statute they constituted prima facie evidence of each fact stated; and that it was the intention of the legislature in enacting the statute to modify the general rules of evidence to the extent that such cerificates should constitute prima facie evidence of the facts therein stated. We are of the opinion that it was the intention of the legislature to so modify the rules of evidence as to render admissible such cerificates to the extent and for the purposes enumerated in Sec. 38-222 (now 39-227) supra."

Subdivision 17 of Section 39-207, Idaho Code, provides that there be included in the certificate "cause of death, including the primary and contributory causes or complications, if any, and duration of each." In this certificate, defendant's Exhibit No. 10 (T. 82), questions and answers are follows:

> Immediate Cause of Death: Pulmonary Embolism.
> Duration: Sudden.

Due to: Herniorrophy. Duration 24 hours.

Dr. Call, a witness called by the appellant, and a skilled surgeon, testified that the word "herniorrhaphy" means "repair of a hernia" (T. 78). It is true that the doctor attempted to qualify somewhat the statement in this certificate, yet, he never denied that the hernia and the surgical treatment therefor contributed to the death. Beginning at page 83 of the Transcript he testified as follows:

Q. At the time you made this certificate you felt that the herniorrhaphy or the hernia operation did have effect upon the embolism, that the embolism was caused from the operation?

A. As a contributing cause.

Q. You admit that the hernia operation was a contributing cause?

A. A contributing cause, yes, we will have to admit that.

The doctor then suggests a possibility that the embolism may have come from some other cause, yet he never departed from the fundamental fact that the hernia operation on April 7, 1947, was a contributing cause of the death of Mr. Wilson.

Beginning at page 85 of the Transcript, Dr. Call testified as follows:

Q. What was the herniorrhaphy due to?

A. Due to the operation at Mayo's.

Q. It all comes to this: If Harry H. Wilson had no hernia he would not have had an operation?

A. Sure.

Q. If he had no operation he would have had no herniorrhaphy?

A. That's right.

The doctor then states that he cannot be sure that the man would not have died had he had no operation, but on page 86 of the Transcript he testified as follows:

Q. It is probable that his death was due to the fact that he was operated on?

A. A contributing cause.

Q. You are sure of that?

A. Yes, sir.

Q. That it was a contributing cause?

A. That's right.

Q. No doubt about that?

A. No.

Q. You would not say that if there had been no operation that Harry H. Wilson would have died on the 8th of April at 5 o'clock in the morning?

A. That's right.

Q. So it was the operation that set in motion that which ended in his death?

A. Fundamentally, yes.

Q. And that was for the hernia?

A. Yes.

He then testified that if the breathing and snoring had anything to do with Mr. Wilson's death the operation was the inciting cause, that the patient had been operated on twice before, once for a bowel obstruction and the second time for a hernia (T. 86). On page 87 of the Transcript he testfied:

Q. If there was any clot that resulted in the embolism, it was certainly due from some of those operations?

A. I think it was from some of those.

Q. Then it was a condition within his body at the time of the last operation?

A. Yes, sir.

Q. It was what we would term a bodily infirmity?

A. That's right.

Much more testimony was elicited from Dr. Call, which leaves no doubt but that the hernia was a contributing cause of the death.

The appellant called at the trial, Dr. W. W. Brothers. Dr. Brothers had nothing to do with the operation and his testimony was predicated upon the testimony of other doctors (T. 100). He gave it as his opinion that death was due to a pulmonary embolism excited by snoring and coughing (T. 102). He did not at any time deny that the hernia operation may have been a contributing cause. On the contrary a fair consideration of his testimony indicates that he felt such

was possible. On page 116 of the Transcript he testified as follows:

> Q. So it is possible that this pulmonary embolism may have come from this operation?
>
> A. Possible but not probable.

While he seemed to conclude that snoring and coughing was the cause of embolism which he said caused the death he did not disprove the theory that the snoring and coughing was due to a bodily infirmity. On the contrary, on cross-examination (T. 109) he was asked and answered the following question:

> Q. I think you said that the condition of his bodily infirmity with reference to the snoring and coughing was the exciting cause of the embolism?
>
> A. Yes, sir.

Furthermore, Dr. Brothers also testified that he thought that the embolism may have been due to the abdominal operation (T. 118). He admitted that it may have been due to a bodily infirmity (T. 117). It seems quite impossible for an intelligent man to argue that a clot of blood in the stream which causes death is not due to some bodily infirmity, particularly when there had preceded three major operations, any one of which could have been the basis of forming of blood clots. Upon the testimony therefore of the appellant's witnesses it would seem quite conclusive that recovery could not be had, particularly under the exceptions of the policy.

The appellee introduced testimony from five eminent surgeons, all of whom had had an unusual amount of experience in surgical work. Dr. Melvin M. Graves testified that a pulmonary embolism is not an unexpected event in surgery, and particularly when the operation is for hernia. At Transcript pages 150-151 he testfied that over fifty percent of post operative deaths in hernia cases are due to embolism and that the expectancy is much greater in the older age group, to which Mr. Wilson belonged, than in the younger group (T. 151). He further testified that an embolism and the administering of opiates may have had an effect upon the patient, all of which, of course, was the result of the operation. Beginning at page 157 he testified:

Q. Following herniorrhaphy, in your opinion, would death following an embolism be the result of the herniorraphy?

A. Yes, I think it would.

Q. Explain why.

A. If a man has an inguinal hernia and on physical examination you find he is in reasonably good health; you admit him to the hospital, you admit him for operative treatment; you are going to repair it by surgery; that is the disease for which he is admitted to the hospital. If he dies from some secondary event the hernia for which he is ad-admitted is the principal cause of death and the terminal event is a contributing cause of death.

Q. Would any effect that was dependent upon the venous system be incidental to that surgical procedure?

A. Yes.

Q. And co-existing with it?

A. Yes, Sir.

Q. Under those conditions would you say that the hernia was the contributing cause?

A. I would say it is the principal cause; no hernia, no death. If it had not been that he was admitted to the hospital for treatment for hernia he would not have died.

On page 159 of the Transcript he testified as follows:

Q. If he died from pulmonary embolism, would the operation for hernia twenty hours earlier be a contributing cause?

A. In my opinion it is the chief cause.

Q. If there had been no hernia there would have been no operation?

A. That is right.

Q. If there was no operation there would be no embolism?

A. That is right.

Q. If there had been no embolism there would have have been no death?

A. That is right.

Q. So death was directly caused by the hernia?

A. That is my opinion.

Q. Hernia was a bodily infirmity?

A. That is right.

Dr. Joseph Beeman, a witness called for the appelle, testified on this point as follows:

Q. Doctor, in your opinion is a pulmonary embolism a probable result of a hernia operation?

A. Yes, sir, a pulmonary embolism may be anticipated and expected following a hernia operation or any other abdominal surgery (T. 164).

Dr. Beeman then explained why a pulmonary embolism was an expected and natural consequence of a hernia operation even though the same had been skillfully performed (T. 164 165), and that the same was reasonably foreseeable (T. 166), and the death following the same was not accidental (T. 167), using the following language: "In my opinion post-operative pulmonary embolism is not accidental for the reason that it arises from a diseased process of the venous system and is anticipated" (T.167).

Dr. O. F. Swindell testified that an embolism could be due to hernia, immobilization, and other contributing factors, and that any patient, particularly of the age of Mr. Wilson, who is operated on presents a potential case for pulmonary embolism (T. 170). At Transcript page 172 he testified that postoperative deaths following hernia operations are five times more frequent than in operations for appendicitis except

where the appendix is ruptured, and that such death was not accidental (T. 173).

Dr. F. A. Pittenger likewise testified that a pulmonary embolism following a hernia operation was something that might be reasonably anticipated. At Transcript 177 he testified as follows:

> Q. Doctor, assuming that the patient, Harry H. Wilson, was operated on for hernia about 8 or 9 o'clock in the morning of April 7 and that he died of pulmonary embolism about 5 o'clock on the morning of the 8th. If he did die from such embolism would the operation for hernia be a contributing cause?
>
> A. Yes, sir.
>
> Q. Assume, Doctor, that Harry H. Wilson was suffering from hernia and that he was operated on for such a hernia and that his death followed within approximately twenty hours thereafter, either from pulmonary embolism or some other similar cause, would the fact that he was operated on for hernia be a contributing cause of his death?
>
> A. Yes sir.

The doctor then testified that post operative deaths following a hernia operation are more prevalent than in other general operations and that the same is reasonably foreseeable in the sense that it is expected (T. 177, 178).

Dr. James L. Stewart testified that post-operative pulmonary embolism is something that is reasonably forseeable and more prevalent in hernia and pelvic operations than in

other general operations and that there is effort made by surgeons to prevent such an embolism (T. 179-181). At Transcript 182 he testified as follows:

> Q. Assume, Doctor, that Harry H. Wilson, was afflicted with a hernia and that he was operated on for this hernia at about 8 o'clock or 9 o'clock a. m. April 7, 1947, and that he died a little before 5:00 o'clock a.m. April 8, 1947, from pulmonary embolism or coronary embolism, would hernia and the treatment therefor be a contributing cause to his death?
>
> A. Yes, sir.
>
> Q. Would the operation for the hernia under such condition and the existence of the hernia be a contributing cause to his death if he had died from other causes?
>
> A. Yes, sir, it would.
>
> Q. State whether or not the fact that he had a hernia and was operated for the hernia and subsequently died be, in and of itself, a contributing cause to his death.
>
> A. Yes, Sir.

Summarizing the foregoing testimony, it is to be noticed that seven doctors testified in this cause. Six of them very definitely stated that the death of Harry H. Wilson was either caused or contributed to by a bodily infirmity or a hernia and medical or surgical treatment thereof. The death certificate prepared and signed by the attending physician, and which under the Idaho statutes is primae facie evidence of the facts

therein stated, definitely recites that the embolism was due to a hernia operation. The seventh doctor, Dr. Brothers, did not deny the foregoing statement, but, as above recited, admitted hat such may have been possible.

A plain, fair analysis of the testimony therefore can lead to no other conclusion than that the death of Mr. Wilson was caused wholly or partly, or the results of which were contributed to, by a hernia or medical or surgical treatment therefor. The parties agreed by the contract that such hernia or medical or surgical treatment must be construed as sickness and hence the resulting death was not within the terms of the policy.

The appellee is not to be understood by the foregoing argument that it admits that the death was an accident, but, even if such should be concluded, nevertheless, under the exception heretofore referred to, the trial court's judgment must be affirmed.

II.

THE POLICY IS NOT AMBIGUOUS AND THE PROVISIONS, TAKEN AS A WHOLE, MUST BE ENFORCED AS THEREIN STATED.

As we understand the appellant's brief there is no serious attack made upon the testimony of the doctors or the ultimate conclusion that must be drawn therefrom to the effect that the operation for hernia was a contributing cause of the death of the deceased. Much language is used in said brief, however, in an attempt to inject ambiguity into the wording of the policy presumably for the purpose of invoking the

general rule that where a policy of insurance is ambiguous it must be construed most strongly against the insurer. This argument has no place in this case because there is no ambiguity in the policy. Such a rule applies only when there is real ambiguity in the language of the policy. The intention of the parties is, after all, the rule that applies in insurance policies as well as in other contracts. Argumentative ambiguities should never be permitted. This rule is discussed in 29 American Jurisprudence, Section 166, and on page 185, it is said:

> "Furthermore, the rule of strict construction applicable against the insurer where the intention of the parties cannot be otherwise ascertained, does not authorize the distortion or perversion of the language used in an insurance contract, nor does it furnish any warrant for creating an ambiguity where none otherwise exists; and the rule that the language of an insurance policy is to be construed most strongly against the insurer is no justification for giving one meaning to a term therein when defining it for the benefit of the insured and another when it is invoked by the insurer."

There are numerous authorities cited in the text to support the foregoing statement. In this case the appellant argues, beginning on page 15 of Appellant's Brief, that the statement "such hernia *** medical or surgical treatment to be construed as sickness" is ambiguous, because it attempts to define something as sickness that is not, and was not, sickness from any standpoint. This is an attempt to read into the policy an ambiguity that does not exist. The policy does not say that such an ailment is sickness but shall be *"construed"* as sickness. Furthermore it is essential and necessary to con-

sider the entire policy to get the meaning of the various phrases. See:

> New York Life Ins. Co. v. Hiatt, 9 Cir. 140 F. 2d 752.
>
> Travelers Insurance Co. v. Ship By Truck Co., 8 Cir. 95 F. 2d 149.
>
> Globe Indemnity Co. v. Wolcott and Lincoln, 8 Cir. 152 F. 2d 545.

This policy is purely an accident policy. It is not a policy insuring against death from sickness. It recites on the first page that the appellee "insures Harry H. Wilson against loss resulting directly and independently of all other causes from bodily injury sustained during any term of this policy and effected solely through accidental means, subject to the provisions, conditions, and limitations herein contained." It then recites the amount that will be paid for specific losses such as "feet," "hands," "eyes," etc. The insurance then covers loss of time and hospital confinement as the result of such bodily injuries. The loss of life is insured against when this loss is the result of an accident as defined in the policy, except for the limitations. These limitations, as the same pertain to the matter under consideration, are contained in paragraph numbered "1" of the General Provisions coverage of the policy, and among other things provide:

> "The accident insurance under this policy covers all bodily injuries, fatal or otherwise, subject to the provisions, conditions and limitations specified in this policy, except: * * * (5) those caused wholly

> or partly, or the results of which are contributed to, by bodily or mental infirmity, hernia, ptomaines, bacterial infection (except pyrogenic infections which shall occur with and through a wound effected by accidental means) or any disease or medical or surgical treatment therefor, such hernia, ptomaines, bacterial infections, disease, or medical or surgical treatment to be construed as sickness."

Again we urge that death from sickness is not insured against. This was certainly known and understood by the assured. Obviously the small premium paid as compared with that which would have been paid if it were an ordinary life insurance policy would impress this fact upon the purchaser, as well as the language of the policy. The language used is perfectly clear, to the effect that the exceptions above mentioned are classified and grouped in a class of insurance not covered by an accident policy; namely, sickness. For the purposes of the policy these ailments are merely *"construed"* by the parties to the contract as sickness. This offered no ambiguity to the trial court. Quoting from the opinion:

> "The second question is concerning the limitation clause in the policy. This is the limitation clause which excepts the defendant from liability, 'injuries, fatal or otherwise *** caused wholly or partly or the results of which are contributed to by * * * hernia * * * or medical * * * treatment therefor.' This policy states plainly hernia or medical treatment therefor is to be construed as sickness" (T. 12, 13).

The Court could not do otherwise than to follow the wording of the policy and, under the evidence, deny recovery. The trial court followed the fundamental rule which is

clearly stated in the syllabus in Davis v. Fidelity Mutual Life Insurance Co., 4th Cir., 107 F. (2) 150:

> "An ambiguity in a life policy is to be construed most favorably to the insured, but courts cannot make a contract for the parties and can only enforce the contract which the parties themselves have made."

Again we suggest that the argument of the appellant that the ambiguity, and therefore the exception, is not enforceable is without foundation in this case either in law or in fact. In Terry v. New York Life Insurance Co., 104 F. (2) 498, on page 504, the Eighth Circuit Court of Appeals says:

> "The rule that ambiguous clauses of an insurance policy are to be construed against the insurer can not be availed of to import into a contract a nonexistent ambiguity, to force unusual meanings from the language used, or to refine away terms expressed with sufficient clearness to convey the plain meaning of the parties. Guarantee Company of North America v. Mechanics' Savings Bank & Trust Co., 183 U. S. 402, 419, 22 S. Ct. 124, 46 L. Ed. 253; Bergholm v. Peoria Life Ins. Co., 284 U. S. 489, 492, 52 S. Ct. 30, 76 L. Ed. 416; Williams v. Union Central Life Ins. Co., 291 U. S. 170, 180, 54 S. Ct. 348, 78 L. Ed. 711, 92 A.L.R. 693; McGlother v. Provident Mutl. Acc. Co., 8 Cir., 89 F. 685, 689; Travelers Ins. Co. v. Spring-Field Fire & Marine Ins. Co., 8 Cir. 89 F. 2d 757. Even though we might think that the meaning of the challenged words used by the insurer could have been better or more accurately expressed, that would constitute no justification for disregarding the plain import of appropriate language. Williams v. Union Central Life Ins. Co., supra.

291 U. S. page 180. 54 S. Ct. 348, 78, L. Ed. 711, 92 A.L.R. 693."

Counsel for the appellant in his brief urges that the case of Jensma v. Sun Life Insurance Company, 64 F. 2d 457, decided by this Honorable Court, supports the request for a reversal of the trial court on this point. We suggest that the case is not contrary to the position urged by the appellee and neither is this case contrary to the rule for which we are contending, that one may not read into an insurance policy matters not contained therein nor create an ambiguity when none in reality exists.

Much reliance is given by the appellant on the case of Browning v. Equitable Life Assurance Society, (Ut.) 72 P. 2d 1060. This case likewise does not militate against the position of the appellee. There appear to be no limitations in the policy considered in the Browning case containing language of the type and character of that used in the policy under consideration. In this case the Utah court recognizes the rule for which we contend and on page 1066 the Utah court quoting from Cato v. Aetna Life Insurance Co., (Ga.) 138 S.E. 787, says:

> "The rights of parties are to be determined by the terms of the policy so far as they are lawful. The language of the contract should be construed as a whole and should receive a reasonable construction, and not be extended beyond what is fairly within the terms of the policy. Where the language is unambiguous and but one reasonable construction of the policy is possible, the court must expound it as made."

Other cases cited by the appellant are predicated upon language which is ambiguous — not where one party attempts to read something into a contract or give it a meaning which clearly does not exist.

Again we suggest that the learned trial court saw no ambiguity in this policy. If he could have seen any, as appears from the opinion written and the decision in the New York Life case. he may have held against the appellee. The very fact that he entered the judgment appealed from is a compelling argument against the present contention of the appellant.

There are a great many cases supporting the position of the appellee to the effect that ambiguity should not be read into a contract nor the language twisted and warped in order to create ambiguity and the contract must be considered as a whole, and that the contract in ordinary and plain language should be enforced in accordance with its terms. A number of these cases are cited in this brief under "Points and Authorities."

In Williams v. Union Central Life Insurance Co., 291 U. S. 170, 78 L. Ed. 711, on page 718 Chief Justice Hughes says:

> "While it is highly important that ambiguous clauses should not be permitted to serve as traps for policy holders, it is equally important to the insured, as well as to the insurer, that the provisions of insurance policies which are clearly and definitely set forth in appropriate language and upon which the calculations of the company are based, should be maintained unimpaired by loose and ill-considered interpretations."

As heretofore suggested this policy was for a premium much less than a life insurance policy. As stated by the doctors who testified, a pulmonary embolism causing death is much more likely to occur as the result of a hernia operation than other types of operations, and obviously such known fact had its bearing upon the wording of this policy and the premium charged therefor.

III.

WITHOUT A CROSS-APPEAL AN APPELLEE MAY URGE IN SUPPORT OF A JUDGMENT ANY MATTER IN THE RECORD, EVEN THOUGH THE TRIAL COURT OVERLOOKED THE POINT OR CONSIDERED IT ADVERSELY TO APPELLEE.

The trial court could have properly and justly held that the death of the deceased was contributed to by a hernia, and this alone would of necessity, under the wording of the policy, have required a decision in favor of the appellee. In the Appellant's Brief it is said on page 8, "the appellee has not filed any cross-appeal" or called for other parts of the record to be printed. The appellee has the right to assume, of course, that all of the record would be printed that has anything to do with any of the testimony in this case, and all exhibits will be before the court. This is clear from the designations of the record made by the appellant. We presume, however, that the foregoing suggestion touching a cross-appeal is made with the idea of limiting the appelate court to a consideration of the precise holding of the trial court without the ability to consider other matters which would support the judgment. While, of course, an appellee without a cross-appeal cannot

attack the judgment appealed from, nevertheless it can urge anything in the record which would support that judgment. In the case of United States v. American Railway Express Co., 265 U. S. 425, 68 L. Ed. 1087, this matter is discussed by Justice Brandeis, and the conclusion of the Court is expressed in the syllabus as follows:

> "An appellee may without taking a cross-appeal urge in support of a decree any matter appearing on the record, although the argument may involve an attack on the reasoning of the lower court or an insistence upon matter overlooked or ignored by it."

The foregoing statement is supported by a number of decisions cited in the opinion. In the case of Morley Construction Co. v. Maryland Casualty Co., 300 U. S. 185, 81 L. Ed. 593, the Supreme Court again follows this rule and cites the above entitled case, and on page 597 says:

> "'Without a cross-appeal an appellee may 'urge in support of a decree any matter appearing in the record although his argument may involve an attack upon the reasoning of the lower court or an insistence upon matter overlooked or ignored by it.'"

Clearly therefore the appellee can and does hereby urge, a consideration of other parts of the policy and the policy as a whole in support of the final judgment.

IV.

THE TRIAL COURT MAY WELL HAVE DECIDED THIS CASE UNDER THE PRIMARY PROVISIONS OF THE POLICY PROVIDING THAT IT COVERED LOSS RESULTING DIRECTLY AND INDEPENDENTLY OF ALL OTHER CAUSES EFFECTED SOLELY THROUGH ACCIDENTAL MEANS.

The judgment of the trial court in this case is seemingly predicated upon the limitations expressed in the policy rather than upon the general provisions. While it is sufficient for the other purposes of this action to have said judgment based upon the limitations prescribed, yet it may well be argued that liability should also be denied upon the basis that the death through embolism following a hernia operation was not an accident. This point is now before this Honorable Court in the csae of New York Life Insurance Company v. Wilson, wherein the same testimony in so far as the general provisions of the policy are concerned was introduced and considered, as appears in the record in this case, and if this court should reverse the trial court in the New York Life case, most certainly it would also of necessity result in an affirmance of this case. We do not mean by this statement that the present case is necessarily controlled by the New York Life case, because the policy, particularly with reference to limitations, is entirely different, and it is contended the trial court should be affirmed in the present case irrespective of the result of the other case. Nevertheless, by reason of the decisions in the Williams and Morley cases, it is thought perfectly proper to urge as an additional ground for the affirmance of this case the fact that the death was not within the general coverage

of the policy. By reason of the fact that the other case is now before the court upon the same testimony so far as this point is concerned as is involved in this case, and has been briefed by counsel it is thought unnecessary to further extend this brief in the argument of such point, although some authorities in support thereof are cited herein, and this argument is therefore asserted in the event that the New York Life case should be reversed as additional reason for the affirmance of the trial court's opinion in this case.

V.

THIS CASE SHOULD BE DECIDED UNDER THE LAW OF MISSOURI

The appellee pleaded as a defense that the insurance policy was written and signed in Kansas City, Missouri, and became a Missouri contract and must be construed under the laws of that State (T. 9). At the trial evidence was introduced in support of this theory, to which evidence, we urge, there was no contradiction. The trial court found that the insured made application for said insurance policy in the State of Idaho, was examined by an Idaho physician, and that said policy was delivered to him in said State. The Court therefore concluded that it was interpreted in accordance with the law of Idaho. This, we contend, was an erroneous construction of the evidence and the law pertaining threrto. The only evidence touching any of the matters contained in Paragraph XV of the Court's Findings (T. 18) is contained in the policy itself. This policy recites that it was signed at the "Home Office" of the Company in Kansas City and that it

became effective at 12:00 o'clock noon at the residence of the insured on the day it was signed. The Court would probably take judicial notice of the time element and that this obviously means that it became effective in Kansas City at 2:00 o'clock p.m. on the day the signature of the Company's official was placed on the policy. The policy further provides that the application shall form a part thereof, and from the application attached to the policy it is to be observed that the premium was transmitted to the Home Office with the application. Hence, at the time the policy was signed the premium had been paid at Kansas City and the policy thereupon at the hour stated became effective. The last act to make the policy effective was the acceptance by the insurance company of Mr. Wilson's application and the premium and the signing of the policy. This was done in Kansas City. The policy was probably mailed from the Home Office in Kansas City, but it was effective nevertheless even before it was mailed. In Restatement of Conflicts of Law of the A.L.I., it is said, sec. 314:

> "When a document embodying a formal contract is to be delivered by mail the place of contracting is where the document is posted."

In 11 American Jurisprudence 390, under the topic "Conflict of Laws," sec. 107, it is said:

> "In accordance with general principles relating to contracts where the parties are in different jurisdictions a contract of insurance is deemed to be executed at the place where the last act is done which is necessary to complete the transaction and bind the

> parties (citing authorities). *** Generally the contract will be deemed to have been made at the Home Office of the insurer if the first premium accompanies the applicaton."

Again, in 11 Am. Jur. p. 448, under "Conflict of Laws," it is said:

> "When the question of the place where a contract of insurance is made is solved the determination of the question as to the construction to be placed upon the terms of the contract and as to the validity thereof and of the laws which are to govern such construction and validity is comparatively easy because it is the almost universal rule that the contract of insurance must be governed by the laws of the state where such contract is finally consummated."

While the Idaho Supreme Court has not had before it the specific question so far as the same affects a contract of insurance, yet the general principle of law above stated has certainly been followed in other cases. In the case of Meier & Frank Co. v. Bruce, 30 Ida, 732, 168 P. 5, the Court had before it a contract executed by a wife in the State of Oregon. It would have been invalid in Idaho because of the manner of its form and execution. The Court, however, applied the last act doctrine and upheld the contract by reason of the laws of Oregon. The Court holds:

> "A contract entered into by a married woman in the State of Oregon while there domiciled and to be performed therein is a valid contract and must be enforced by the courts of this state."

In the case of C. I. T. Corporation v. Sanderson, 43 F. 2d 985, the Court had for consideration a contract which was entered into in California and which was valid under the California law but not valid under the Idaho law, because in Idaho a woman could not bind herself under such a contract, but in California she could. The Court holds:

> "Contract is considered as entered into at the place where the offer is accepted and delivery made or where the last act necessary to complete performance is made."

The Court also holds:

> "Contract of guarantee required to be forwarded to California for acceptance by creditor in advancing funds thereon held made in California."

This same matter was again before the Court in the same case reported in 49 F. 2d 937, wherein again the Court held:

> "Guarantee required to be forwarded to California for acceptance by creditor advancing funds held made in California and governed by the laws thereof."

Other cases supporting this same rule have heretofore been cited in this brief under Points and Authorities.

Here the last act done under this policy was in Missouri. The application was probably forwarded to Missouri together with the premium, but there was no contract until such was accepted and the policy signed. Under the universal law the construction of this contract must necessarily be under

the Missouri law. There are some Idaho cases where it has been held that in insurance contracts the Idaho law applied, but this particular point has not been raised in such cases, and undoubtedly the facts as they exist in this case were not presented in these other cases. It is therefore apparent that the law of Idaho is not contrary to the general rule hereinbefore expressed. Some question might arise as to whether or not a Federal Court will take judicial notice of the laws of other states of the Union. In Prudential Insurance Company of America v. Carlson, 126 F. 2d 607, it is held:

> "Where accident policy provided that it was not to take effect until approved by insurer at its home office in New Jersey, policy was a New Jersey contract and was governed by the laws of New Jersey."

Also:

> "A Federal court takes judicial notice of the laws not only of the forum but also those of other states, but such rule means no more than that one relying upon a statute of a foreign state need not plead it."

In Zell v. American Seeting Co., 138 F. 2d 641, it is held:

> "Federal Courts take judicial notice of the decisions of courts of the several states."

This same doctrine has been followed by this Court in Judith Basin Land Co. v. Fergus County, (Mont.) 9th Cir., 50 F. 2d 792, wherein it is said:

> "Courts of the United States take judicial notice of

> the laws of any state whether depending upon state statute or judicial decision."
>
> Lamar v. Micou, 114 U. S. 218, 5 S. Ct. 857, 29 L. E. 94.

Fearing some contention might arise as to whether or not it was necessary to plead and prove the law of another jurisdiction, the appellee pleaded the law of Missouri, and also introduced in evidence the reported cases of Caldwell v. Travelers Insurance Co., (Mo.) 267 S. W. 907, and Pope v. Business Men's Assurance Co., (Mo.) 131 S. W. 2d 887 (T. 183). The proof of these cases in this manner is justified under Rule 43 of the Rules of Federal Procedure and Section 9-308 Idaho Code.

The law of Missouri in the construction of insurance policies of the character under consideration and, as a matter of fact, of this paritcular policy, definitely precludes recovery by the appellant upon any theory, under the facts in this case, and even without the consideration of hernia and bodily infirmity contributing to the death as hereinbefore argued. In the case of Caldwell v. Travelers Insurance Co., (Mo.), 267 S. W. 907, 39 A. L. R. 56. as appears from the sylabi in the A. L. R. report, it is held:

> "Unusual and unexpected obstruction of patient's bowels by a skillful operation performed on him for hernia, causing death, is not within a policy insuring against death from bodily injuries effected directly and independently of all other means through external, violent and accidental means."

This case also holds:

"One attempting to recover on a policy insuring against death by accidental means has the burden of showing an accidental cause of insured's death."

Also:

"To recover under a policy insuring against death by accidental means, for death following a surgical operation performed in a skillful manner, plaintiff must show that something unforeseen, unusual, or unexpected and unintended occured during the progress of the operation and that this caused the death."

The Caldwell case overruled some other cases heretofore decided by the Missouri Court. In the opinion the Court says:

"The evidence offered by plaintiff tended to show that on November 6, 1920, the insured was operated upon for two hernias. Not only does the evidence show, but the petition alleges, that the operation was skillfully performed. There is no evidence of any mischance, slip, or mishap, nor of any unexpected, unusual or unforseen occurrence during the performance of said operation. The operating surgeon testified that he could not do it any better if he had to do it over, and that he did not think anyone else could do it any better. No more injury by way of cutting or lacertaion was caused than was actually necessary in the performance of the operation. The operation was performed at the request of the insured."

The Court then says that notwithstanding the highest skill was used, an obstruction occurred in the bowel which caused the insured's death. A large number of cases on this point were considered and the court concludes that such death was not caused by accidental means.

In the case of Pope v. Business Mens' Assurance Company, 131 S.W. 2d 887, the Missouri Court had under consideration the precise form of policy now before this Court. The Court held that there was no liability under the policy. It is held:

> "Under policy payable on death of policyholder, through accidental means, where an unusual or unexpected result occurs by reason of the doing by the insured of an intentional act, and no mischance, slip or mishap occurs in the doing of the act itself, the ensuing injury or death is not caused through accidental means."

Also, this case holds:

> "Under policy insuring against death through accidental means, it must appear that the means used were accidental, and it is not sufficient to warrant recovery that the result may be unusual, unexpected, or unforeseen.

It will be observed from a consideration of these cases that it would be impossible for the appellant to recover on this policy under the laws of Missouri under any theory. A consideration of the foregoing principle and cases is urged in support of the judgment if the Court should conclude that the trial court erred in the theory adopted in the case at bar or if there should be an affirmance of the New York Life case.

CONCLUSION

In conclusion therefore it is most respectfully submitted

that the judgment of the trial court in this case must be affirmed.

Respectfully Submitted,

A. L. MERRILL
R. D. MERRILL
W. F. MERRILL

Attorneys for Appellee.
Residence: Pocatello, Idaho

APPENDIX "A"

Sec. 39-207, Idaho Code. CERTIFICATES OF DEATH.—The certificate of death shall contain the following items:

* * * * * * * * * *

17. Cause of death, including the primary and contributory causes or complications, if any, and duration of each. * *

Sec. 39-227, Idaho Code. CERTIFIED COPIES AND SEACHES FOR BIRTH AND DEATH CERTIFICATES —USE AS EVIDENCE—FEES.—The department of public health shall, upon request, furnish any applicant a certified copy of the record of any birth or death registered under the provisions of this chapter, for the making and certification of which it shall be entitled to a fee of fifty cents, to be paid by the applicant; and any such copy of the record of birth or death, when properly certified by the department to be a true copy thereof, shall be prima facie evidence in all courts and places of the facts therein stated. * * *

Sec. 9-308, Idaho Code. ORAL EVIDENCE OF COMMON LAW—REPORTS OF DECISIONS.—The oral testimony of witnesses skilled therein is admissible as evidence of the unwritten law of another state, territory or foreign country, as are also printed and published books of reports of decisions of the courts of such state, territory or country, commonly admitted in such courts.